LEMBAH MAYANG SDN BHD & ORS

v.

PENGARAH JABATAN PERHUTANAN & ANOR

HIGH COURT SABAH & SARAWAK, SANDAKAN
LINTON ALBERT JC
[MOTION NO: S25-02-2003]
18 MAY 2004

CIVIL PROCEDURE: *Contempt of court - Order of committal, application for - Grounds - First respondent served with consent orders and stay order - Letter of confiscation and termination issued by first respondent as response - Whether a blatant disregard of the court's orders - Whether first respondent guilty of contempt*

CIVIL PROCEDURE: *Contempt of court - Order of committal, application for - Failure to indorse penal notice on order of court - Whether fatal*

The first and second applicants were under separate logging agreements engaged by one Rakyat Berjaya Sdn Bhd (RBJ) to extract and purchase logs from certain parts of a timber licence area under parcels known as coupes of which Yayasan Sabah (YS), a statutory body was the licensee. The director of forestry ('the first respondent') was appointed to the board of directors of RBJ. On 10 November 2003, the first and second applicants had obtained injunctive reliefs (the consent orders) against RBJ for it to permit the first and second applicants to remove transport or load into vessels timber felled, to extract timber from parts not exceeding 25 degrees slope limit and to be entitled to sell the logs extracted from the said coupes. On the same day they applied for an order of *certiorari*, they had also obtained an interim order (the stay order) that all proceedings or acts related to the three letters issued by the first respondent imposing immediate prohibition of logging beyond the 25 degrees slope limit and allegation of illegal felling be stayed. On 18 November 2003, the consent orders and the stay order were served on the first respondent. However, on 8 December 2003, the first respondent issued a confiscation and termination letter, proclaiming that he was directed to inform RBJ that the said coupes were cancelled with immediate effect and all felled logs were ordered seized and confiscated. All proceeds of sale of logs already sold or yet to be sold by RBJ were to be deposited with the Forest Department. The applicants contended that the confiscation and termination letter was a blatant disobedience of the stay order and consent orders. Thus, this application by notice of motion for an order of committal against the first respondent.

Held (allowing the application):

[1] The strenuous but belated attempt by the State Attorney General to justify the issuance of the confiscation and termination letter by referring to the provisions of the Forest Enactment 1968 (Sabah) under which the first respondent had the power to seize and confiscate the logs and to suspend and ultimately cancel the said coupes was of no assistance. RBJ's contractors should not be intimidated into accepting their losses to the benefit of the state government. Further, actions such as invoking the powers of the Director of Forestry under the Forest Enactment 1968 (Sabah), in the seizure and forfeiture of timber logs extracted at great expense by contractors and termination of timber licences to deprive them of their contractual rights to carry out logging should be repugned. (p 471 b-d)

[2] The court disagreed with the State Attorney General's contention that the order granting leave to apply for an order of *certiorari* which carried with it the stay order not being indorsed with a penal notice was fatal to the application. Such an indorsement was not necessary. Following the case of *Puah Bee Hong & Anor v. Pentadbir Tanah Daerah Wilayah Persekutuan & Anor*, it was held that service of the stay order was not essential and all that was required was for the contemnor to have notice of the stay order. (p 470 f-g)

[3] The principle that a court order shall be obeyed must remain sacrosanct and cannot be sacrificed on the altar of the purported exercise of the statutory powers conferred on the first respondent by the Forest Enactment 1968 (Sabah). The applicants have established their case beyond reasonable doubt and the first respondent was accordingly found guilty of contempt. (p 471 f-g)

[Motion allowed with costs; first respondent sentenced to a fine of RM1,000 in default of one month's imprisonment.]

Case(s) referred to:

Attorney General v. Times Newspaper Ltd [1974] AC 273 ***(refd)***

Mah Siew Keong v. Bayu Gamitan Sdn Bhd & Other Appeals [2002] 1 CLJ 695 CA ***(dist)***

Loh Eng Leong & Anor v. Lo Min Sen & Sons Sdn Bhd [2003] 4 CLJ 743 CA ***(refd)***

MBf Holdings Bhd v. Houng Hai Kong & Ors [1995] 1 MLJ 135 ***(refd)***

Murray Herbert v. Chandra Sri Ram [1994] 4 MLJ 321 ***(refd)***

Puah Bee Hong & Anor v. Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor (Teo Kent Tuan Robert Interverner) & Another Appeal [1994] 2 MLJ 601 ***(refd)***

For the applicants - Marina Tiu; M/s Yap Chin & Tiu
For the respondents - Mohamed Bazain Idris (Julita Gumpil)

Reported by Suhainah Wahiduddin

JUDGMENT

Linton Albert JC:

This is an application by notice of motion for an order of committal against the first respondent, the Director of Forestry, one Daniel K.S. Khiong. The background of this case is summarised as follows. The 1st and 2nd applicants were under separate agreements (the logging agreements) engaged by one Rakyat Berjaya Sdn Bhd (RBJ) to extract and purchase logs from certain parts of a timber licence area under parcels known as coupes of which Yayasan Sabah (YS) a statutory body, is the licensee. RBJ, the assignee of the timber licence is a subsidiary of YS. The powers that be at the time, in their wisdom, appointed the 1st respondent to the Board of Directors of RBJ on 11 March 2003.

The 1st and 2nd applicants had respectively on 10 November 2003 with the consent of RBJ obtained injunctive reliefs (the Consent Orders) against RBJ. In their successful application on the very same day for leave to apply for an Order of *Certiorari*, the 1st and 2nd applicants had also obtained an interim order (the Stay Order) that all proceedings or acts relating to three letters issued by the 1st respondent be stayed.

Briefly, the substance of the Consent Orders and the Stay Order is this:

Consent Orders:

1. RBJ would forthwith allow or permit the 1st and 2nd applicants to remove transport or load into vessels timber felled, extracted and to be felled and extracted from coupes YL1/00,YL2/00, YS1/00 and YS2/00 (the said coupes) and the logs lying above the 25 degrees slope and RBJ shall when requested by the applicants make the necessary applications to the 1st respondent to enable the applicants to do so.

2. the 1st and 2nd applicants shall forthwith be entitled to and RHB shall forthwith allow or permit the 1st and 2nd applicants to fell, cut and extract timber from those parts not exceeding the 25 degrees slope limit within the said coupes without interference or hindrance from RBJ.

3. the applicants shall be entitled to sell the logs extracted from the said coupes subject to the terms of the logging agreements.

4. RBJ shall in all respects assist the applicants in the felling extraction and removal of logs from the said coupes.

The Stay Order

Stay of all acts and proceedings in respect of three letters issued by the 1st respondent (the Director's letters) namely:

1. Letter dated 28 November 2002 imposing immediate prohibition of logging beyond the 25 degrees slope limit in the said coupes.

2. Letter dated 5 September 2003 alleging illegal felling beyond the 25 degrees slope limit within the said coupes, logging and damaging the riparian reserves and logging and felling undersized and oversized trees with offer to compound the alleged offences and suspension of operations in the said coupes and detention of all logs.

3. Letter dated 6 October 2003 confirming discovery of tree stumps which constituted the alleged illegal felling and imposition of penalties on the illegal felling in the said coupes as follows:

   (a) 1591 stumps within coupe YL1/00 with an estimated volume of 11,146 cubic metres and imposing a penalty of RM4,695,592.10;

   (b) 1543 stumps within coupe YL2/00 with an estimated volume of 10,341.50 cubic metres and a penalty of RM2,781,663.00; and

   (c) 72 stumps within coupe YS1/00 with an estimated volume of 650.05 cubic metres and imposing a penalty of RM170,383.20.

The Consent Orders and the Stay Order were served on the 1st respondent personally on 18 November 2003. The powers that be at the time had thus, in their wisdom in appointing the 1st respondent to the Board of Directors of RBJ placed him squarely between the devil and the deep blue sea. The 1st respondent's response was as swift as it was defiant. On 8 December 2003 he issued a letter (the Confiscation and Termination Letter) reminiscent of edicts dispensed by officials in banana republics. The Confiscation and Termination Letter proclaimed that he was directed to inform RBJ that the said coupes were cancelled with immediate effect and all felled logs wherever they may be were ordered seized and confiscated and all proceeds of sale of logs already sold by RBJ together with the proceeds of sale of the logs yet to be sold by RBJ were to be deposited with the Forest Department. The Confiscation and Termination Letter also featured with some prominence the fact that it was also being copied to the State Attorney General, no less, with a reference to the State Attorney General's "directive" dated 5 December 2003, to boot. RBJ, of course, did not care a hoot about the 1st respondent getting high and mighty;

it had nothing to lose, and if anything, even derived some benefit by selling the logs as directed by the 1st respondent. The applicants were undoubtedly left high and dry. They had by a stroke of the 1st respondent's pen lost tens of millions of ringgit if the penalties, based as they were on royalties, totaling more than RM7 million were anything to go by for the purpose of estimating their loss occasioned by the confiscation of their logs. The efforts of the applicants in obtaining the Consent Orders and the Stay Order came to naught. The prospects of future logging in and potential earnings from the said coupes were totally lost. Those who manage or are shareholders of the applicants and others who depend on them for a living must have felt as though they were indeed in a banana republic. So much for the background. I shall now turn to consider whether a case beyond reasonable doubt has been made out against the 1st respondent (see *Murray Herbert v. Chandra Sri Ram* [1994] 4 MLJ 321).

Learned counsel for the applicants, Datin Marina Tiu submitted that the Confiscation and Termination Letter was in itself a blatant disobedience of the Stay Order, the utter disregard for which was further compounded by the 1st respondent's refusal to withdraw the Confiscation and Termination Letter although the applicants had by their letter dated 10 December 2003 given the 1st respondent until 12 December 2003 to do so.

The State Attorney General, Encik Mohamed Bazain bin Idris, in defence of the 1st respondent dealt at length with the alleged irregularity and impropriety of the Stay Order which was part of the leave granted to the applicants to apply for an Order of Certiorari to quash the decisions contained in the Director's Letters. With respect, I do not accept that the alleged irregularity or impropriety of a Court Order has any relevance and is therefore of no assistance to the 1st respondent, (see *Mbf Holdings Bhd v. Houng Hai Kong & Ors* [1995] 1 MLJ 135). In *Puah Bee Hong & Anor v. Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor (Teo Kent Tuan Robert Intervener) And Another Appeal* [1994] 2 MLJ 601, Peh Swee Chin, SCJ delivering the judgment of the Supreme Court at p. 610 had this to say:

> It is that, apart from the Rules of the High Court 1980, the High Court has always that inherent jurisdiction to order a stay of proceedings to prevent any abuse of process. Further where a superior court of record such as the High Court and the courts above it, has the jurisdiction or discretion to decide any cause or matter by way of appeal, judicial review or otherwise, such superior court will have the inherently incidental power in any event to suspend the operation or execution of any order concerned in such cause or matter pending the decision of such court, but such power will be exercised according to the usual principles applicable thereto, or otherwise judicially, according to fair play and common sense. To deny such power would render such appeal or judicial review, etc, illusory or an exercise in futility.

> We are of the considered view that an order of a superior court such as the High Court, even if it is eg, an order obtained *ex parte* or a default judgment; until it is set aside, must be obeyed by everyone whether its validity is challenged or not, and 'it is the plain and unqualified obligation of every person against, or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until the order is discharged', per Romer LJ in *Hadkinson v. Hadkinson* [1952] 2 All ER 567.

It was contended on behalf of the 1st respondent that the contents of the Stay Order and the Consent Orders lacked clarity and on the authority of *Mah Siew Keong v. Bayu Gamitan Sdn Bhd & Other Appeals* [2002] 1 CLJ 695, the 1st respondent cannot possibly be guilty of contempt. Much as the masterly exposition by the State Attorney General of the intricacies of the Stay Order and the Consent Orders is to be admired, I do not think that the inconsistencies and ambiguities even if they indeed exist, are of any consequence. The very act of the 1st respondent in issuing the Confiscation and Termination Letter being so blatant and contemptuous in his disobedience and sweeping in its effectiveness in rendering the Stay Order and Consent Orders totally useless in their entirety, the question of inconsistency or ambiguity does not arise at all. Hence *Mah Siew Keong*'s case can easily be distinguished. In that case the question was whether the alleged contemnors were guilty of contempt when they failed to execute certain deeds of assignments pursuant to a joint venture agreement which was the subject matter of the court order restraining the doing of any act contrary to or in contravention of the provisions of the joint venture agreement.

It is painfully apparent that the 1st respondent was from the moment the Stay Order and Consent Orders were served on him, hell-bent on disobeying and rendering those Court Orders otiose. There was no attempt to clothe the Confiscation and Termination Letter with the powers conferred on the 1st respondent by the provisions of the Forest Enactment 1968 because no reference whatsoever was made to the provisions under which the Confiscation and Termination Letter was issued. The strenuous but belated attempt by the State Attorney General to justify the issuance of the Confiscation and Termination Letter by referring to the provisions of the Forest Enactment 1968 under which the 1st respondent has the power to seize and confiscate the logs and to suspend and ultimately cancel the said coupes is of no assistance. It is at best a fig-leaf attempt to conceal the fact that the 1st respondent contrived to rid himself of the need to carry out the Stay Order in his capacity as Director of Forestry and to relief him of the onerous task of having to comply with the Consent Orders as a director of RBJ. For that reason it is unnecessary in my view, to consider whether the 1st respondent aided and abetted disobedience of the

Consent Orders by RBJ or whether the Stay Order was in fact an injunction against the Government or that certain aspects of the Stay Order were *fait accompli* or that the charge lacked clarity, although the State Attorney General had devoted a substantial part of his written submission exhaustively examining these issues and which was responded to at great length by learned counsel for the applicants. As to the State Attorney General's contention that the Order granting leave to apply for an order of *certiorari* which carries with it the Stay Order not being indorsed with a penal notice and therefore fatal to this application, I agree with the submission of Datin Marina Tiu that such an indorsement is not necessary and I need only refer to one of the several cases cited by learned counsel. In the case of *Puah Bee Hong & Anor v. Pentadbir Tanah Daerah Wilayah Persekutuan & Anor (supra)* it was held by the Supreme Court that service of the Stay Order was not essential, a *fortiori*, the need for indorsement of the penal notice. All that is required is for the contemnor to have notice of the Stay Order. The Court of Appeal case of *Loh Eng Leong & Anor v. Lo Min Sen & Sons Sdn Bhd* [2003] 4 CLJ 743 is of no assistance to the 1st respondent because the *ratio decidendi* in that case was that the order requiring the Register of Members to be rectified did not specify a period within which the rectification must be done. The appellant's application for leave to commence committal proceedings for breach of the order was dismissed on that basis.

It is neither useful nor appropriate to speculate on the reason the 1st respondent who is the Director of Forestry was appointed a director of RBJ, a purely business entity linked to the State Government, but if, in so appointing, the powers that be at the time had envisaged, as this case seems to suggest, that disputes between RBJ and its contractors can be arbitrarily determined and RBJ's contractors cowed into accepting their losses to the benefit of the State Government and RBJ by invoking the powers of the Director of Forestry under the Forest Enactment 1968 in the seizure and forfeiture of timber logs extracted at great expense by contractors and termination of timber licences to deprive them of their contractual rights to carry out logging, then such an arrangement must be viewed with repugnance. The principle that a court order shall be obeyed must remain sacrosanct and cannot be sacrificed on the altar of the purported exercise of the statutory powers conferred on the 1st respondent by the Forest Enactment 1968. It is perhaps apt to conclude by citing a passage in the judgment of Lord Morris of Borth-y-Gest in *Attorney General v. Times Newspaper Ltd* [1974] AC 273 where the principle was eloquently expressed as follows:

> The Juridical basis of contempt is not because those charged with the responsibilities and administering justice are concerned with their own dignity: it is because the very structure of ordered life is at risk if the recognised courts of the land are so flouted that their authority wanes and supplanted.

For the reasons and in the circumstances aforesaid the applicants have established their case beyond reasonable doubt and the 1st respondent is accordingly found guilty of contempt. The motion is therefore allowed with costs.

Having to determine a case of this nature can never be pleasant and even more so is the task of considering the appropriate sentence to be meted out. I have carefully considered the submissions of Encik Mohamed Bazain bin Idris and Datin Marina Tiu. The passion demonstrated by the latter in urging this court to impose a custodial sentence is only natural in the light of the disastrous consequences of the 1st respondent's contempt on the applicants. I must confess I have agonized over imposing a custodial sentence as it seems compelling to do so in the circumstances. On the other hand, I cannot disregard the fact that the contemnor in this case, the 1st respondent, holds the apex position in the Forestry Department and is nearing retirement. A custodial sentence would invariably put his pension in great jeopardy. It was also probable that the 1st respondent was beholden to, and issued the Confiscation and Termination Letter at the behest of the powers that be. For the reasons aforesaid I have with utmost reluctance decided not to impose a custodial sentence and instead sentence the 1st respondent to a fine of RM1,000 in default of one month's imprisonment. Order accordingly.